IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 10044 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE K.A.PUJ

==========

1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

==========

RUPESH JAYVADAN KAPADIA - Applicant(s)
Versus
STATE OF GUJARAT - Respondent(s)

==========

Appearance :
MR AD SHAH for Applicant(s) : 1,
MR HL JANI, APP for Respondent(s) : 1,

==========

CORAM : HONOURABLE MR.JUSTICE K.A.PUJ

Date : 26/10/2005

ORAL JUDGMENT

1.The petitioner has filed this petition under Section 482 of the Criminal Procedure Code praying for quashing and setting aside the Criminal Case No. 3950 of 2004 pending in the Court of Chief Judicial Magistrate, Surat qua the petitioner.

2.It is the case of the petitioner that on 20.06.2004, reliable information was received that one Dilip Chhaganbhai Lakhpati, resident of Varachha road had arranged birth-day party at Bhatha Gam in the open plot of Bipinbhai. It is also the case of the prosecution that the open plot was covered by cloth wall and there was a programme of Orchestra, Dayaro and Dinner. The information further revealed that the Indian made imported liquor was also to be served in the said party and huge stock of liquor was arranged and that the party was

going on. It is the case of the prosecution that in pursuance to the said information, the complainant and others decided to visit the place and carry out the raid and hence, panch witnesses were called. It was also the case of the complainant that the members of the raiding party entered the plot from main gate and raided the same and called upon the persons present there to remain in the same situation. It is also the case of the petitioner that some of the persons sitting behind having realized about the raid, ran away from back portion and as there was darkness and the other area being agricultural land, it was not possible to catch hold of those persons who ran away from back portion. The persons who were cordoned off were about 104 which included Orchestra people, catering party people, lighting personnel, photographer and videographer. During the course of the said raid on many tables, liquor bottles were found and some of the bottles were

half-filled. Some of the glasses on tables contained liquor and eatables were found on the tables. It is also the case of the complainant that out of 104 persons, 48 persons were smelling of strong alcohol and their eyes were reddish. The names and addresses of those 48 persons were recorded and when they were called upon to produce license or pass or permit, they were not in a position to produce the same. It is also the case of the complainant that remaining persons were interrogated and their names and addresses were noted down and they were 49 in numbers. It is also the case of the complainant that there was Opel Corsa Car bearing No. GJ-5-AR-3867 in the compound. There were in all 42 four-wheelers, 14 two-wheelers and one three-wheeler.

3. Based on the aforesaid information, the complainant filed complaint against all these persons for committing the offences under

Section 66(1)(b), 65(a)(e), 81 and 86 of the Bombay Prohibition Act. During the course of investigation, Photography and Videography done at the party were seized and the said photographs and video-cassettes were seen in presence of Panchas. The statements of persons whose vehicles were found were also recorded and police submitted Charge-sheet against number of accused. The petitioner is one of the accused arrested by the D.C.B. Police on the basis that this Car bearing No. GJ-5-AR-3867 was found at the compound.

4.Mr. A.D. Shah, learned advocate appearing for the petitioner submits that as per the Charge-sheet, there are 168 accused and considering backlog of cases in the court of Chief Judicial Magistrate, it is practically impossible for commencement of the trial by recording plea of 168 accused at one time. The only evidence against the petitioner – accused is the find of

his 'Opel Corsa' Car No. GJ-5-AR-3867 at the compound. There is no other evidence against the petitioner – accused to show that he was present at the party when the raid was carried out or he had consumed alcohol or he was in possession of alcohol. The Investigating Officer has arrested all those persons who attended the party. It is the case of the complainant that there was Birth-day Party and there was arrangement of musical night as well as Dinner. The offence alleged against the accused are under Section 66(1)(b) which requires consumption and possession of intoxicants. There is no evidence that the petitioner – accused had consumed intoxicant at this party. There is also no evidence that the petitioner – accused possessed intoxicant at the said party. Other offences charged in the Charge-sheet are under Section 65 as well as Section 81 of the Bombay Prohibition Act. There is no material in the Charge-sheet that

there was any attempt by the petitioner – accused to consume or possess intoxicant. There is also no evidence from the papers of charge-sheet to show that petitioner – accused intentionally aided the commission of offence of consumption or possession under the Bombay Prohibition Act. He has, therefore, submitted that the said provisions are not applicable to the petitioner – accused.

5.Mr. Shah has further submitted that Section 86 of the Bombay Prohibition Act is meant for providing penalty for allowing any premises to be used for purpose of committing an offence under the Act. As per the prosecution case, it is accused Bipin Bhandari who had allowed his plot to be used for this party and the petitioner – accused, under no circumstances, can be charged for the said offence. The petitioner – accused is neither owner or occupier or having the use or care or

management or control of this plot where party was arranged. He has, therefore, submitted that the said provision cannot be made applicable to the petitioner – accused.

6.Mr. Shah has further submitted that if the entire charge-sheet papers are perused, there is no other material which could justify prosecution of the accused. The papers of charge-sheet no where reflect that the petitioner was in possession of any liquor or had consumed any liquor. The petitioner is arrested on the basis of seizure of his car in the compound. Mr. Shah has further submitted that it cannot be presumed that all those who attended the birth-day party where liquor was also served would be guilty of possession of liquor or consumption of liquor. The provisions of the Bombay Prohibition Act clearly provide for presumption as to consumption of intoxicant when the percentage

of alcohol in blood is 0.05 and above. Thus, there is no material that when the raiding party went to the birth-day party, the petitioner was present. There is no material that the petitioner accused had consumed intoxicant namely liquor. Thus, merely because the car of the petitioner accused was found in the compound of a birth-day-party, it cannot be concluded that the petitioner accused had participated in a drinking party and thereby committed offence punishable under Section 65(a)(e), Section 66(1)(b), Section 81 and 86 of the Bombay Prohibition Act.

7. The case of a person in a drinking party came up for consideration before the Hon'ble Apex Court in the matter of **Patel Jethabhai Chatur V/s. State of Gujarat, AIR 1977 S.C. 294** wherein it is observed that it would not be correct to say that merely because a participant in a drinking party can stretch his

hand and take liquor for his use and consumption, he can be held to be in possession of liquor. The question is not whether a participant in a drinking party can place himself in possession of liquor by stretching his hand and taking it but whether he is actually in possession of it. Possession again must be distinguished from custody and it must be conscious possession. If, for example, a bottle of liquor is kept by someone in the car or house of a person without his knowledge, he cannot be said to be in possession of the bottle of liquor. It cannot, therefore, be laid down as an absolute proposition that whoever is present at a drinking party must necessarily be guilty of the offence of possession of liquor and must be charged for such offence.

8.Mr. Shah has, therefore, submitted that there being no legal evidence suggestive of

petitioner either having taken the glass of whisky/liquor or having consumed whisky/liquor, the petitioner – accused could not have been charge-sheeted for the said offences. The material collected, during investigation, is absolutely insufficient to justify submission of charge-sheet against the petitioner-accused. Even the materials in nature of photographs and/or video-cassette do not remotely connect the petitioner accused with the charges levelled against him.

9.Mr. Shah has further relied on the decision of the Hon'ble Supreme Court in the case of **Madhavrao Jiwaji Rao Scindia and another V/s. Sambhajirao Chandrojirao Angre and others, AIR 1988 S.C. 709** wherein it is held that the legal position is well settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the Court is as to whether the uncontroverted allegations as

made prima facie establish the offence. It is also for the Court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the Court cannot be utilised for any oblique purpose and where in the opinion of the Court chances of an ultimate conviction are bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the Court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage.

10.Mr. Shah has further submitted that the Charge-sheet papers reveal that the prosecution has relied on the statements of the co-accused. However, legal position is well settled and the statement of the co-accused cannot be relied on

for the purpose of establishing an offence against the petitioner. He has, therefore, submitted that the charge-sheet filed against the present petitioner is required to be quashed and set aside. Even the confession made by the petitioner before the Investigating Officer cannot be pressed into service for the purpose of establishing the charge against the petitioner. For this purpose, he relied on the decision of the Hon'ble Supreme Court in the case of **Chandra Kant Chiman Lal Desai V/s. State of Gujarat, 1992 (1) Crimes 232** wherein the Hon'ble Supreme Court has held that the prosecution must fully establish the incriminating facts and circumstances by cogent and reliable evidence and the facts so established must be consistent with the guilt of accused and should not be capable of being explained away on any other reasonable hypothesis than of his guilt. The Court further observed that the Trial Court found to

have given cogent reasons for not accepting the evidence of prosecution witnesses deposing the chain of circumstances and then tried to find out if the facts stated therein were corroborated in material particulars by other evidence instead of analysing the evidence first and trying to find out whether the evidence was reliable and the facts established were consistent with the guilt of accused. The Court held that the approach of the High Court was wrong.

11.Mr. H.L. Jani, learned Assistant Public Prosecutor, on the other hand, has submitted that looking to the averments made in the complaint as well as the Charge-sheet papers, the involvement of the petitioner cannot be doubted. The very fact that the petitioner's Car was found at the site itself indicates that the petitioner was very much there and looking to the arrival of the raiding party, he has

left the premises. The petitioner was not found thereafter and hence, his medical test could not be taken. He has, therefore, submitted that during the course of trial, true facts may be revealed and it is premature to quash the complaint qua the petitioner at this stage. He has further submitted that the ratio laid down by the Hon'ble Supreme Court in the case of **Kaptan Singh and others V/s. State of M.P. and another, AIR 1997 S.C. 2485** squarely applies to the facts of the present case wherein while referring to the judgment of the Apex Court in the case of *Vijender V/s. State of Delhi, (1997) 3 JT (SC) 131*, the Court observed that a finding of guilt can be recorded against an accused without a trial, relying solely upon the police report submitted under Section 173 of Cr.P.C., which is the outcome of an investigation. The result of investigation under Chapter XII of the Criminal Procedure Code is a conclusion that an

Investigating Officer draws on the basis of materials collected during investigation and such conclusion can only form the basis of a competent Court to take cognizance thereupon under Section 190(1)(b), Cr.P.C. and to proceed with the case for trial, where the materials collected during investigation are to be translated into legal evidence. The Trial Court is then required to base its conclusion solely on the evidence adduced during the trial; and it cannot rely on the investigation or the result thereof. The Court, therefore, took the view that order of High Court setting aside the acquittal in exercise of its revisional power is proper.

12.After having heard learned advocate appearing for the petitioner and the learned Assistant Public Prosecutor and after having gone through the complaint as well as the Charge-sheet papers, the Court is of the view that except

the statement of the co-accused, there is no evidence against the present petitioner establishing his involvement in commission of the offence. The petitioner was not found at the site. He was not found in possession of any liquor. Neither in photograph nor in videography, the petitioner's presence was revealed. Simply on the basis of the presence of the petitioner's car at the site, the petitioner could not be impleaded as an accused in the Charge-sheet. There is no independent witness against the petitioner.

13.Considering the entire facts and circumstances of the case and taking overall view of the matter, the Court is of the view that no prima facie case is made out against the present petitioner and neither the complaint nor the Charge-sheet discloses any offence against the present petitioner. In this view of the matter, the case against the present petitioner

is not required to be tried by the criminal Court and complaint filed against the present petitioner is, therefore, quashed and set aside. Rule is made absolute without any order as to costs. Direct Service is permitted.

[K.A. PUJ, J.]

Savariya